

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





# 75-7517/7580

ORIGINAL

To be argued by  
RONALD J. OFFENKRANTZ

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**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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N.V. MAATSCHAPPIJ VOOR INDUSTRIELE WAARDEN,  
*Petitioner-Appellee,*  
*against*

A. O. SMITH CORPORATION,  
*Respondent,*  
*and*

ARMOR ELEVATOR COMPANY, INC.,  
*Respondent-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK

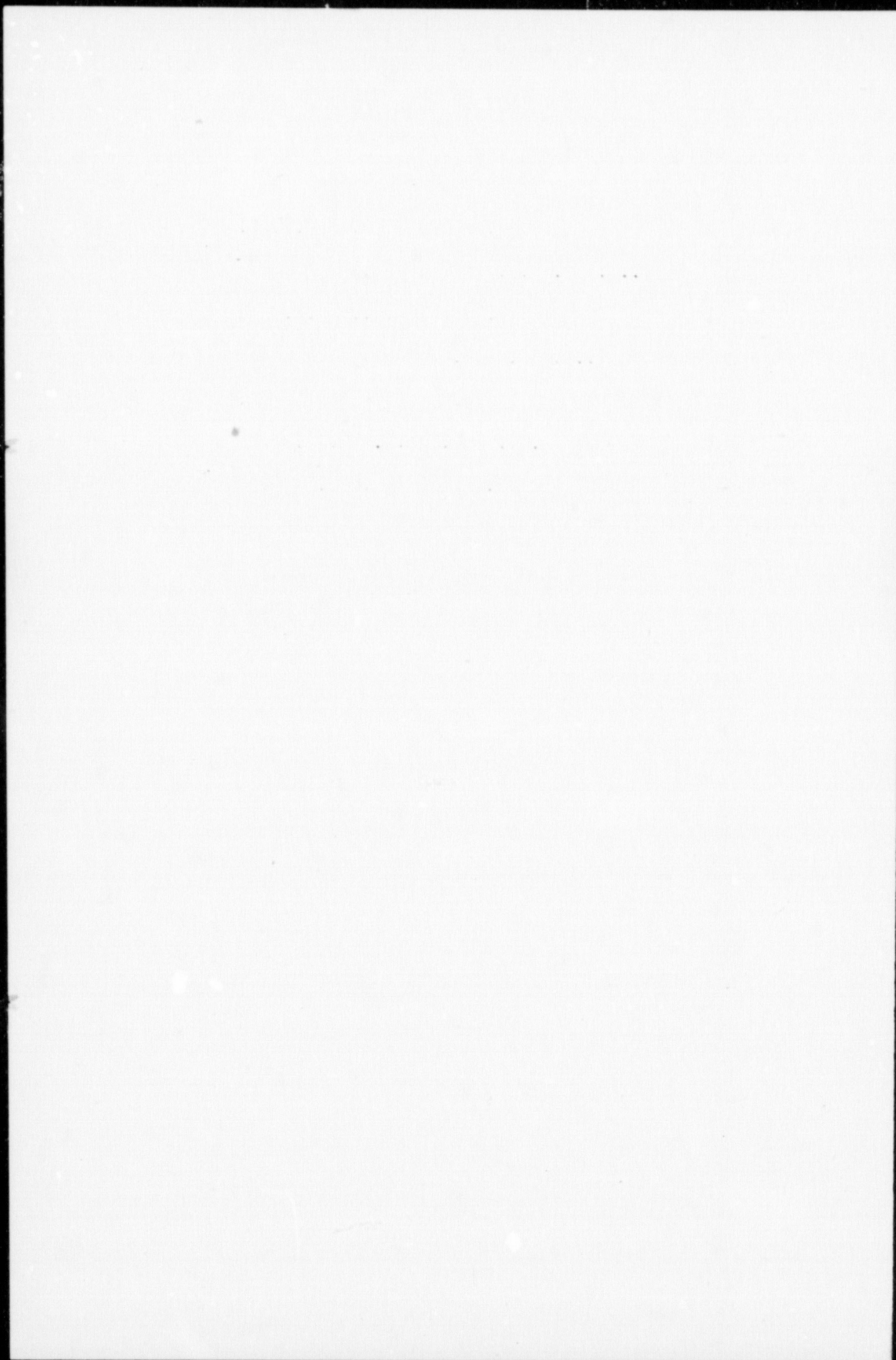
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**BRIEF FOR PETITIONER-APPELLEE**  
**N. V. MAATSCHAPPIJ VOOR**  
**INDUSTRIELE WAARDEN**

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**Issues Presented**

The stratagems to which Armor Elevator Company, Inc. (Armor), has resorted to repudiate its agreement to arbitrate have not been confined to the proceedings below but have continued in this Court to the extent that Armor has now discarded the issues tendered for review in the Pre-Argument Statement filed September 11, 1975 and has misstated the nature of the orders appealed from.

Those orders do not, as suggested by Armor (App. Br. pp. 1-2), arise out of a "court action initiated" by it which had been wrongly stayed pending arbitration, nor do they involve a failure by the District Court "to determine whether or not the issues raised by [Armor] \* \* \* are arbitrable."

To the contrary, the proceedings below were initiated by N. V. Maatschappij Voor Industriële Waarden (MVIW) to compel arbitration pursuant to the provisions of the Federal Arbitration Act, to prevent the disclosure of confidential know-how by Armor and to prevent the negotiation by it of a sub-license in violation of a patent and know-how License Agreement.

The petition to compel arbitration resulted in a decision filed July 24, 1975 and an order entered August 6, 1975, directing arbitration of the disputes between the parties, and enjoining Armor from interfering with the status quo. Armor has now conceded that only arbitrable issues were referred to arbitration, but premises its appeals to this Court on anti-trust issues raised for the first time in a purported amended pleading served three months after the petition to compel arbitration had been fully argued and long after arbitration had been ordered and Armor's Arbitrator had been appointed.

The real issues presented on this appeal are:

1. Whether the District Court order dated October 14, 1975, which stayed further proceedings in that Court and stayed the consideration of the belatedly asserted counterclaims, constitutes an appealable order within the principles enunciated by this Court in *Diematic Mfg. Corp. v. Packaging Industries, Inc.*, 516 F. 2d 975 (2d Cir. 1975) cert. denied — U.S. —, 44 U.S.L.W. 3238 (Oct. 21, 1975), and *Standard Chlorine of Delaware, Inc. v. Leonard*, 384 F. 2d 304 (2d Cir. 1967).

2. Whether in the circumstances here presented and in view of Armor's concession that the issues referred to arbitration are indeed arbitrable, costs and sanctions should be imposed under the provisions of 28 U.S.C. §§ 1912 and 1927 and the order appealed from in Docket No. 75-7517 affirmed.

3. Assuming, *arguendo*, that the order of October 14, 1975 staying further proceedings before the District Court pending completion of arbitration is properly before this Court and appealable under the provisions of 28 U.S.C. 1292(a)(1), whether a respondent may lie back, suffer an adverse decision, and then months later raise the specter of anti-trust as a means of avoiding a previously ordered arbitration and be heard to urge that the District Court abused its discretion in refusing to litigate those anti-trust claims prior to arbitration.

### Statement of the Case

These consolidated appeals taken by Armor arise out of proceedings initiated by MVIW in the United States District Court for the Southern District of New York (Bonsal, J.) pursuant to the Federal Arbitration Act to compel arbitration and for an injunction to maintain the status quo until completion of the arbitral process. The first appeal (Docket No. 75-7517) is taken from the order of August 6, 1975 which directed arbitration of the disputes between Armor and MVIW arising out of a patent and know-how license agreement and enjoined Armor from interfering with the status quo and divulging confidential know-how to third parties pending completion of arbitration.

Three months after argument and two months after the filing of the memorandum decision compelling arbitration, Armor served and filed a purported amended answer con-



taining counterclaims not theretofore presented to the District Court and concurrently applied for a stay of the arbitration pending trial of anti-trust and patent misuse claims first asserted in the amended pleading. The District Court by order dated October 14, 1975 stayed all proceedings before it until completion of arbitration. Upon Armor's motion for reargument, the Court adhered to that position, noting that anti-trust issues had not been referred to arbitration and that the license agreement itself contained a severability clause. Armor appeals from that order (Docket No. 75-7580).

### **The Status of the Arbitration Proceedings**

MVIW and Armor have designated their respective arbitrators who, in turn have, under the auspices of the American Arbitration Association, which is administering the arbitration, designated the neutral arbitrator. The arbitration panel is now complete.

On November 17, 1975, Armor interposed its answer and counterclaim in that arbitration without any reservation whatsoever and demanded as follows:

Armor Elevator Company, Inc. (Armor) in its answer to the claim set forth herein by N. V. Maatschappij Voor Industriële Waarden hereby interposes its general denial and asserts as its affirmative defense, setoff and/or counterclaim the breach of the said License Agreement dated October 1, 1973 and the representations and warranties contained therein in that the claimant: failed to timely furnish proprietary technical information and data pertaining to the manufacture and installment of the licensed products that would fulfill the system description and performance criteria and requirements set forth in the License Agreement and conveyed technical information which it knew or should have known infringed upon the patents of others in force in the Territory, all of which

prevented Armor from manufacturing and selling gearless elevators employing the licensed products and caused it to lose its competitive standing in the elevator industry as a whole.

Armor seeks the following relief:

A determination that claimant has breached the License Agreement and the representations and warranties contained therein and an award of all damages sustained by Armor as a result thereof, return of the initial payment made by Armor to claimant under the License Agreement of \$75,000 (Australian) and minimum annual royalty payments in the sum of \$12,500 (Australian) paid to claimant under the License Agreement and a determination that the License Agreement is no longer in effect between the parties because of the foregoing breaches and pursuant to Article VIII thereof in that a claim of infringement upon the patents of another within the Territory has been asserted of which claimant has been advised.

The American Arbitration Association has sent to both parties proposed calendars for January and February, 1976 and has requested the selection of dates for the arbitration hearing.

### **Facts**

#### **The License Agreement Between MVIW and Armor**

By written agreement dated October 1, 1973 (A17-A88), MVIW granted Armor an exclusive license for a territory (A21-A22) comprising the United States, Puerto Rico, Virgin Islands and all other United States possessions and protectorates as well as the Dominion of Canada to use specified United States and Canadian patents for the manufacture and sale of gearless elevators employing defined

licensed products and to use and practice Know-how consisting of proprietary technical information as to methods, operating techniques, processes, materials, data, drawings, engineering information, experience, machinery, equipment and tooling, including information and devices falling within the claims of the patents used in the manufacture of those products (A4-A5). Performance of the Agreement was guaranteed by A. O. Smith Corporation (Smith), Armor's parent.

The Agreement provided for the payment of an initial sum of 75,000 Australian dollars upon delivery of drawings and data and the payment of a royalty for each gearless elevator installed involving the use of the licensed products. The earned royalties were to be credited against minimum royalties in the aggregate amount of 565,000 Australian Dollars, payable over a five-year period (A5, A35-A39, A43, A45).

Armor undertook to sell and manufacture the gearless elevators employing the licensed products, represented that it would be "one of the essential objects of Armor's business" (A34) and that it would allocate resources, capital, equipment and labor to make the elevators, and at all times to use its "best efforts to promote a demand for and to sell" the products (A34-A35).

Armor was specifically permitted to "continue to manufacture and supply elevators of its own design \* \* \*" (A35).

Provision was made that all the technical and confidential information imparted to Armor would be kept "in the strictest secrecy and confidence" (A29) and Armor was prohibited from sublicensing without MVIW's written approval (A25). By the fall of 1974, Armor had not yet commenced to manufacture any of the licensed products; instead, by letter dated September 20, 1974, it suggested cancellation of the License Agreement (A9). Its engineers,



who had visited Australia for on-site inspections of operating equipment, departed on that day leaving a note behind them directing MVIW "not [to] send any documents to Armor" (A91, A148-A149). When the additional material, which they had previously requested, was sent, it was refused by Armor which would not cause its clearance through United States Customs (A9, A116).

In November 1974, Armor was notified that it was in default under the agreement; through Smith's general counsel, James N. Johnson, it requested that MVIW refrain from exercising its remedies under the Agreement and suggested a meeting in New York to review the position of the parties (A9, A10, A152, A157).

At a meeting held in New York City on January 25, 1975 (A10, A115), Armor stated that it had no intention of proceeding under the Agreement, that the market had passed it by, and that there had been some deficiencies in the drawings that had been submitted (A9, A10, A93, A115). Armor requested (A10, A116) and MVIW agreed that, without prejudice to MVIW's position that Armor was in default under the License Agreement and that the default was continuing, Armor be permitted to analyze the material which it had rejected and was warehoused in the United States Customs Warehouse, upon its representation that such review might cause Armor to reverse its position and proceed in accordance with the Agreement (A92-A93, A116).

Thereupon and without reviewing the material, Mr. Johnson, acting as counsel both to Armor and to its "sales affiliate" Armor Canada (A96, A122, A138-A139), authorized patent counsel to communicate with Westinghouse Canada and to inform it—despite the pronouncements Mr. Johnson had just made at the New York meeting that the patents and know-how were useless—that Armor

"intended to commence production under [MVIW's patents] and know-how \* \* \* (A96, A103, A128-A129, A140-A141, A153).

Armor Canada, which was involved in an unrelated patent dispute with Westinghouse, proposed unauthor- izedly to cross-license (A140-A141) MVIW's patents and know-how. The contact with Westinghouse provoked, as patently was its purpose, a letter from the Westinghouse Patent Department Manager (dated April 29, 1975) expressing the "belief" that any elevator or system built in accordance with MVIW's patents

"would probably infringe various Westinghouse patents which I will not list at present since I have not studied the situation in detail" (A94, A96).

Relying upon that response as a purported "claim of infringement", Armor suspended all royalty payments under the License Agreement (A44, A94-A99, A103, A110).

Acknowledging that it had no right to cross-license or sublicense any of the patents without MVIW's consent (A96), Armor then demanded that MVIW "defend" the Westinghouse "claim" and threatened to undertake such defense itself if MVIW failed to do so (A103, A110). Inherent in the ability to "defend" was, as Armor noted in its original answer to the petition (A130), the ability if "reasonably necessary to enter into a licensing agreement with any other person \* \* \*" which would have included Westinghouse if Armor had chosen (A130).

In response to MVIW's notification to Armor that there was no claim to defend, that Armor was in default (A157) and had no right to discuss cross-licensing or sub-licensing with Westinghouse, Armor replied that it had already contacted Westinghouse and would

"take those measures deemed necessary or advisable to protect its interest in the matter. MVIW had its opportunity, under the contract, to defend and elected not to do so \* \* \*" (A110).



### **The Demand for Arbitration**

MVIW's demand for arbitration (A111) was served on June 17, 1975. It described the nature of the arbitrable disputes as follows:

"Breach of the License Agreement dated October 1, 1973, the performance of which and the payment of all obligations thereunder are guaranteed by A. O. Smith Corporation, including the failure to fulfill the obligation to develop and market the licensed products or gearless elevators embodying the licensed products or embodying the Know-how conveyed pursuant to the Agreement and the failure to pay required royalties; divulgence of confidential know-how to a competitor and attempted sublicensing in violation of the Agreement dated October 1, 1973; conspiracy to keep licensed products off the U.S. and Canadian markets while at the same time precluding licensing by claimant of others."

When Armor and its parent Smith not only refused to designate their arbitrator, but maintained that they were free to "defend" their self-induced claim and were not obliged to maintain the status quo pending completion of arbitration, MVIW initiated proceedings under the provisions of the United States Arbitration Act, 9 U.S.C. § 1 *et seq.* to compel arbitration and to enjoin any interference with the status quo until the completion of the arbitral process.

### **The Proceedings in the District Court and the Orders Appealed From**

The Order to Show Cause granted upon the Petition to Compel Arbitration was returnable on June 30, 1975 (A1). Armor and Smith did not request an adjournment, served and filed their joint answer to the petition and gave no indication to the Court that they had or intended to assert

any additional defenses, claims or counterclaims. The matter was argued and all parties were granted leave until July 2, 1975 to file additional papers (A1). Armor and Smith filed a supplemental memorandum of law and an affidavit by Mr. Johnson (A1), making no claim that their answer was incomplete (A137, A140-A142).

The answer of Armor and Smith contained no counter-demands for arbitration or any allegations of anti-trust violations or claims of patent misuse. Their affirmative defenses were that the License Agreement was executed in New York and that petitioner was not qualified to do business in New York or Kentucky (A122) (whereas the License Agreement on its face shows that it was executed in Toronto, Canada), that neither Smith nor Armor had agreed to submit to arbitration any of the issues raised by MVIW in the Demand for Arbitration (A122), that the material furnished by MVIW to Armor was incomplete, that MVIW had materially breached the terms of the License Agreement (A122-A126), that MVIW had by virtue of instituting proceedings, "denied Armor the right to negotiate or enter into an agreement with Westinghouse Canada Ltd. or anyone else \* \* \*" (A131), and that MVIW knew or should have known that the patents and know-how licensed "infringed upon various patents of Westinghouse Canada Ltd. and other persons. \* \* \*" (A132).

Armor and Smith demanded, *inter alia*, that the District Court convert the proceedings to an action for declaratory relief and declare that MVIW had breached the provisions of the License Agreement (A133) and that the District Court enjoin arbitration (A133-A136).

Inasmuch as the parties believed that the grant of the motion to compel arbitration would moot the purported counterclaims, it was agreed that MVIW's time to respond to them would be deferred until ten days after determination of the petition to compel. Armor's attorneys subsequently refused to execute a stipulation which also incor-

porated MVIW's right to make any motion addressed to the counterclaims and the District Court by orders dated July 7, 1975 (A159) and July 24, 1975 (A161) extended the time to answer *or* move.\*

### **The District Court's Memorandum Decision**

The District Court's decision filed July 24, 1975, directed arbitration between MVIW and Armor except for one dispute held non-arbitrable, and Smith's defense that as guarantor of the License Agreement it was not bound to arbitrate was sustained (A163-A172).

Reviewing the breadth of the arbitration provisions, the Court adverted to the

"first issue raised in MVIW's demand for arbitration [to wit] 'the failure to fulfill the obligation to develop and market the licensed products or gearless elevators embodying the licensed products or embodying the know-how conveyed pursuant to the Agreement and the failure to pay required royalties'" (A168)

and held that

"The papers on file indicate that this issue arises as a result of disputes between the parties concerning whether MVIW has furnished Armor the technical information required by Article III of the agreement; whether the asserted failure of MVIW to furnish the required information relieves Armor of its obligations under the agreement; and whether a letter dated April 29, 1975 from R.H. Fox, Manager, Patent Department,

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\* The affidavit submitted in support of the orders dated July 7, and July 24, 1975 reciting the agreement to defer any consideration of the purported counterclaims since they could or would be mooted by the grant of the petition to compel arbitration was omitted from the joint appendix on appeal filed by Armor but may be found in the original record in Docket 75-7517 as exhibits to items designated "11" and "12".



Westinghouse Canada Ltd. to Merl Sceales, constitutes a 'claim' within the meaning of Article VIII of the agreement which would suspend Armor's obligation to pay royalties and afford Armor a choice of various courses of action, including defense of the 'claim' if MVIW elects not to take over the defense. The Court finds that these disputes are covered by the agreement of the parties to submit to arbitration 'any unresolved difference or dispute between the parties concerning the obligation to make payment of any amounts of money provided for in this Agreement or relating to the meaning or application of the provisions of any of the Articles of this Agreement.' " (A168)

The second issue involved Armor's alleged divulgence of confidential know-how to a competitor and Armor's attempted sublicensing in violation of the Agreement \* \* \* (A169). Citing Article III, section 6, which provided in relevant part that

"Armor shall keep in strictest secrecy and confidence all technical information which it shall receive pursuant to this Agreement and shall exercise all necessary precautions to safeguard the secrecy of the Patents and Know-how to prevent unauthorized disclosure thereof or of any part or parts thereof. . . ." (A169)

the Court held that the second dispute was arbitrable.

In so ruling, the Court also referred to Article II (b), which provided that the license granted to Armor

"may not be assigned or transferred by Armor or by operation of law or otherwise and confers no right to grant sublicenses." (A169)

Injunctive relief maintaining the status quo was held to be necessary and appropriate because a disclosure of con-

fidential information by Armor could result in irreparable injury to MVIW, and in view of Armor's reluctance voluntarily to maintain the status quo pending arbitration, an injunction was granted upon the posting by MVIW of a \$250,000 bond. *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972).

For almost two months Armor and Smith sat back, made no motion to reargue and in no way indicated that any additional claims could be asserted.

The District Court's order compelling arbitration was filed on August 6, 1975 (A1).

On August 15, 1975, MVIW moved, on more than five weeks notice, to strike the purported counterclaims contained in the answer, the motion being returnable on September 22, 1975 (A2, A177-A178).

On August 22, 1975 Armor appointed its arbitrator.

On September 5, 1975 Armor filed its notice of appeal and, shortly thereafter filed its Pre-Argument Statement which contained no claim or defense other than those contained in its original answer.

It was not until September 17, 1975, two business days before the return date of MVIW's motion, that Armor for the first time raised anti-trust and patent misuse claims in a purported amended answer made entirely "upon information and belief" and which attempted to incorporate by reference (A181) all of "the material allegations of [the original answer] \* \* \* as they may pertain" to Armor's anti-trust claim. Concurrently, Armor applied by "cross motion", for an order halting the arbitration, demanding that

"\* \* \* the issues heretofore referred to arbitration by order of this Court dated August 4, 1975, be tried by this Court simultaneously with a determination of the all encompassing issues raised in respondent's

Answer, Counterclaim and Cross Petition and in respondent's Amended Answer Counterclaim and Cross Petition;" (A206).

That request was denied on oral argument (A2) and the District Court ruled that all further proceedings should be stayed pending completion of the arbitration proceedings (A2, A212-A216).

Armor moved for reargument (A219-A211) premised on the grounds that the District Court had overlooked the facts and misapplied the law and that the counterclaims contained in the purported "Amended Answer" were required to be "tried by the Court prior to any arbitration in this matter" (A211). The Court held:

"Armor's motion for reargument is denied. The anti-trust issues remain with the Court. *Compare American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968). Article XVII (7) of the Agreement is a severability clause.

It is so ordered." (A217).

The District Court's formal order staying further proceedings until completion of arbitration was "without prejudice" to MVIW's rights, in the event of a subsequent vacatur of that stay to reassert all the defenses and objections to the Armor counterclaims contained in both the original and "amended" answer (A215).

The District Court acted more charitably to Armor than Armor deserved since the omission of the purported anti-trust claims and their belated assertion was not the result of any inadvertence or any lack of knowledge of the application of anti-trust defenses to patent and know-how license agreements. Smith's counsel, Mr. Johnson whose name appears on the "Amended Answer" had only recently filed Smith's brief in the Court of Appeals for the Tenth



Circuit, asserting anti-trust matters as a defense to such a license agreement involving another Smith subsidiary, *Sims Consolidated Ltd. v. Irrigation and Power Equipment Co.*, 518 F.2d 413 (10th Cir. 1975), cert. denied — U.S. —, 44 U.S.L.W. 3238 (October 21, 1975). In that brief, dated February, 1975 (Br. for App. A. O. Smith Corporation. Docket No. 74-1732), Smith had argued that a license agreement covering the United States and Canada involved an "unlawful allocation of territories" and that the agreement was "in restraint of trade". An adverse decision had been rendered on June 24, 1975, prior to the preparation of the answer in opposition to MVIW's petition.\*

#### **The Prior Proceedings in this Court**

After securing a number of extensions to file its brief and appendix on appeal, Armor moved to consolidate, for purposes of argument, its appeals from the order of August 6, 1975 and from the order of October 14, 1975.

Armor moved in this Court for a stay of the arbitration pending decision herein, which motion was denied on November 18, 1975. Similarly denied was MVIW's motion to dismiss or summarily affirm the orders appealed from on the grounds that the appeals were non-meritorious on their face and could be decided without the necessity of briefs. MVIW's motion seeking dismissal of the appeal in Docket No. 75-7580 for the reason that the order dated October 14, 1975 was not a final order and not appealable to this Court was denied with leave to renew on the argument of the full appeal.

It is MVIW's position on this appeal that the order dated October 14, 1975 is not a final order and does not consti-

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\* In ruling against Smith, the Court of Appeals found that Smith had unilaterally repudiated the License Agreement and that "each of the other allegations of error raised" were "singularly and collectively void of merit."

tute an injunction within the meaning of 28 U.S.C. § 1292 (a)(1), hence unappealable.

Having successfully avoided summary dismissal of its appeal in Docket No. 75-7517, Armor has now filed a brief which fails to set forth any argument in support of its position that the order entered August 6, 1975 is erroneous. It has abandoned, on this appeal, each issue referred to by it in the Pre-Argument Statement and now concedes that only arbitrable issue have been referred to arbitration. That reversal of position and the failure to demonstrate that the District Court erred in its decision of July 24, 1975 or in the order entered thereon, requires affirmance of the order appealed from as well as the imposition of appropriate costs and sanctions.

### POINT I

**The District Court order dated October 14, 1975 staying further proceedings before it until completion of the arbitration which had been previously compelled is not appealable to this court and the appeal in Docket No. 75-7580 should be dismissed.**

In *Wilson Brothers v. Textile Workers Union of America*, 224 F. 2d 177 (2d Cir. 1955), this Court held that the stay of an action for declaratory judgment pending arbitration

“was merely a decision about the manner in which the trial of the case should proceed, and not an injunction,”

hence unappealable.

More recently, in *Diematic Mfg. Corp. v. Packaging Industries, Inc.*, 516 F.2d 975 (2d Cir. 1975), *cert. denied* — U.S. —, 44 U.S.L.W. 3238 (Oct. 21, 1975), this Court reviewed the question of appealability of orders granting or denying stays pending completion of arbitration, and,



reiterating the principle enunciated in *Standard Chlorine of Delaware, Inc. v. Leonard*, 384 F.2d 304 (2d Cir. 1967), held that

"An order staying or refusing to stay proceedings in the District Court is appealable under § 1292(a)(1) only if (A) the action in which the order was made is an action which, before the fusion of law and equity, was by its nature an action at law; and (B) the stay was sought to permit the prior determination of some equitable defense or counterclaim."

The order appealed from in *Diematic, supra*, arising out of a motion to stay an action for declaratory relief (which included claims of patent invalidity and anti-trust) was held non-appealable since

"\* \* \* the relief sought in the action which Packaging unsuccessfully attempted to have stayed was primarily, or at least not incidentally, equitable, that the damages sought in the anti-trust action are properly characterized as incidental and that the order in question is therefore not appealable under the *Standard Chlorine* test." (*Diematic, supra*, at p. 979).

To avoid the force and effect of the *Standard Chlorine* test in addition to the principles enunciated in *Wilson Brothers v. Textile Workers Union of America, supra*, Armor misleadingly casts itself as the "initiator" of a "court action" rather than the recalcitrant party to an arbitration agreement and the unsuccessful respondent in a proceeding brought to compel arbitration under the provisions of the United States Arbitration Act.

When MVIW instituted proceedings to compel arbitration, under 9 U.S.C. § 4, it did not commence "an action which, before the fusion of law and equity, was by its nature an action at law." The petition to compel arbitration commenced a summary proceeding which, in accord-

ance with the provisions of 9 U.S.C. § 6 was "made and heard in the manner provided by law for the making and hearing of motions" and was summarily determined thus effectuating the Congressional intent to expedite judicial treatment of matters pertaining to arbitration. *World Brilliance Corporation v. Bethlehem Steel Company*, 342 F.2d 362 (2d Cir. 1965); cf. *Econo-Car International Inc. v. Antilles Car Rentals, Inc.*, 61 F.R.D. 8 (D. St. Croix 1973); *In re Worcester Silk Mills Corp.*, 50 F.2d 966 (SDNY 1927); *Greenwich Marine, Inc. v. S.S. Alexandria*, 225 F.Supp. 671, 675 (SDNY 1964) aff'd 339 F.2d 901 (2d Cir. 1965) (petition under § 4 commences an "independent proceeding").

Armor's answer, which included a demand for declaratory relief and rescission of the License Agreement (A133) did not change the character of the proceedings into an action at law. Its purported amended answer and counterclaim variously characterized in its Brief on Appeal as a "supplement" to its original pleading (p. 8) or an "amplifi[cation]" or "detail[ing]" (p. 10) of its prior claims—including the demand for rescission—did not make the proceeding "legal" rather than equitable.

When the District Court ruled that all matters were to be stayed pending completion of the arbitration which it had previously directed and when it expressly reserved to MVIW the right to move in respect of those purported claims, including a motion to strike each claim as impermissibly asserted in this equitable proceeding, it entered no order from which an appeal as of right could be taken. To the extent that cognizable anti-trust claims have been interposed at all, they are "incidental" to Armor's request for equitable relief, having been raised in equitable and not legal proceedings, *Baltimore Contractors Inc. v. Bodinger*, 348 U.S. 176 (1955); *Schoenamsgruber v. Hamburg America Line*, 294 U.S. 454 (1935); *General Construction Co. v. Hering Realty Co.*, 286 F.2d 641 (4th Cir. 1961);

*Chapman v. International Ladies' Garment Workers' Union*, 401 F.2d 626 (4th Cir. 1968), and the appeal from the order dated October 14, 1975, should be dismissed.

## POINT II

The District Court order of August 6, 1975 from which Armor appeals in Docket No. 75-7517 compelled arbitration of disputes which Armor now concedes to be arbitrable. That concession, together with the abandonment of the other issues originally tendered for review requires affirmance of the order appealed from and the imposition of costs and sanctions.

In much the same manner as Armor informed MVIW that Armor did not intend to proceed to manufacture the licensed products because the market had "passed it by" and because technical information was deficient, only to inform Westinghouse Canada Ltd. immediately thereafter that:

"Armor intended to commence production \* \* \*"  
(A96),

so too has Armor dealt with MVIW and with this Court on the within appeal.

The primary thrust of Armor's appeal from the order compelling arbitration was that the District Court had erroneously concluded that the disputes referred to arbitration were arbitrable. That issue has been abandoned.

The second issue alleged to have been erroneously decided by the Court below was the question of the grant of an injunction maintaining the status quo, which issue is not once alluded to in Armor's brief.



The third and final issue alleged to warrant reversal consisted of the claim that the District Court erred in failing to grant the relief demanded by Armor in its original answer (converting the action to one for declaratory relief and declaring that MVIW and not Armor breached the Agreement), which is not only specious but has been abandoned and Armor has interposed its answer and counterclaim in the arbitration wherein its claims in respect of MVIW's "breach" are asserted. See *supra*, pp. 5 and 6.

Thus the appeal in Docket No. 75-7517 is no longer, nor could it ever have been, properly structured on a claim of error as to the breadth of the arbitration clause or its applicability to the issues tendered by MVIW.

The Court below recognized its obligation to determine

"Whether the parties have agreed to submit particular disputes to arbitration" (A167).

It took cognizance of the numerous decisions of the Supreme Court and of this Court requiring that arbitration clauses are to be resolved in favor of arbitration and not against it. *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1212 (2d Cir.), cert. denied, 406 U.S. 949 (1972). See also, *Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co.*, 298 F.2d 644, 645-646 (2d Cir. 1962); *Carey v. General Electric Corp.*, 315 F.2d 499, 501-504 (2d Cir. 1963); *Hamilton Life Ins. Co. of N.Y. v. Republic Nat. Life Ins. Co.*, 408 F.2d 606 (2d Cir. 1969); *International Union v. General Electric*, 474 F.2d 1172 (6th Cir. 1973).

In short, Armor does not seriously urge that the District Court failed to meet its responsibility under 9 U.S.C. § 4, to wit:

"The Court shall hear the parties, and upon being satisfied that the making of the agreement for arbitra-

tion or the failure to comply therewith is not in issue, the Court shall make an order directing the parties to proceed to arbitrate in accordance with the terms of the Agreement."

See, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *R.F.C. v. Harrisons & Crosfield, Ltd.*, 204 F.2d 366 (2d Cir. 1953), cert. denied, 346 U.S. 854 (1953); *Trafalgar Shipping Co. v. International Mill Co.*, 401 F.2d 568 (2d Cir. 1968).

In *Chatham Shipping Co. v. Fertex Steamship Corporation*, 352 F.2d 291 (2d Cir. 1965), this Court recognized the imposition placed upon it and upon a petitioner seeking to compel arbitration by the prosecution of unmeritorious appeals which are calculated to frustrate the purpose of arbitration. The Court stated that:

"This Court does not mean \* \* \* that appellate courts must sit by while wholly unmeritorious appeals frustrate the purpose of arbitration clauses to provide a speedy and economical solution of business or labor disputes."

Those comments are applicable here since nowhere in Armor's brief is there any argument or assertion that the District Court misconceived the issues, misread the License Agreement or improperly referred a non-arbitrable issue to the arbitrators.

28 U.S.C. § 1912 permits this Court, in its discretion to adjudge single or double costs to a prevailing party as just damages for delay; 28 U.S.C. § 1927 permits the assessment of costs where proceedings have been so multiplied as to increase costs unreasonably and vexatiously. *Oscar Gruss & Son v. Lumberman's Mutual Cas. Co.*, 422 F.2d 1278 (2d Cir. 1970). See also *Hall v. Cole*, 412 U.S. 1, 5 (1972).

This appeal, which involves Armor's abandonment of its major argument that the matters referred to arbitration are non-arbitrable and which is premised, instead, on belatedly asserted anti-trust claims improperly contained in a pleading bearing the name of Smith's general counsel (A204), is reminiscent of the "mental gymnastics" found to exist by the Court of Appeals in *Sims, supra*, where Smith was found to have orchestrated the "unilateral termination and repudiation" of a valid license agreement.

There, as here, Smith and its subsidiary had argued invalidity of the agreement and had further argued that the contract was illusory since the know-how conveyed was not secret, to which the Court responded:

"[those] theories [were] advanced in defiance of logic and without support of cogent authority [and did] not comport with the facts of this case."

There, as here, Smith had not included in its answer to the complaint any claim of anti-trust or patent misuse although, on appeal, it relied on those issues as having been properly presented.\*

The same type of "gymnastics" are being attempted here by Armor's assertion that an order entered on August 6, 1975 should be reversed on the sole ground that the interposition of an amended answer two months later retroactively invalidates that order.

That type of reasoning and the imposition on MVIW of the burdens incident to this appeal at a time when Armor

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\* The assertion of the anti-trust claim on appeal evoked the following response from Appellee Sims (Br. for Sims at p. 65) " \* \* \* this so-called point on appeal is actually an allegation never before raised against Sims below. The answer to the complaint \* \* \* did not raise such a defense; the pretrial statement of issues \* \* \* for the pretrial conference of January 5, 1973 does not contain even the slightest intimation of an anti-trust defense or any improper acts on the part of Sims to give rise to such a defense; nor did the Trial Court rule on any such issue."



has suspended payment of all royalties under the Agreement, warrants the assessment of costs and attorneys' fees as well as affirmance of the order appealed from.

The net impression one gets from this record

"is one of calculated delay and a thrashing about by [Armor] for theories—even of dubious or no value—to evade its obligations \* \* \*" *Oscar Gruss & Son v. Lumberman's Mutual Cas. Co.*, *supra* (at p. 1283).

### POINT III

**The refusal of the District Court to abort the previously directed arbitration in favor of lengthy litigation of spurious claims cannot be said to be an abuse of discretion where those claims were not even raised until long after the decision compelling arbitration.**

Assuming the appealability of the order of October 14, 1975, not one of the citations of authority relied upon by Armor in its brief to this Court supports the conclusion that the District Court acted improperly when it refused to halt the arbitration proceedings and, instead, stayed all further proceedings before it, rather than engage in a trial of "the all encompassing issues" (A206) said to have been presented by Armor in its "amended answer."

*American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968) and *A. & E. Plastik Pak v. Monsanto Company*, 396 F.2d 710 (8th Cir. 1968), which are both cited in Armor's brief (at p. 17) as supportive of Armor's position, are directly against it.

In *American Safety Equipment Corp.*, *supra*, this Court held that anti-trust issues had been improperly referred to arbitration but did *not* hold that it would be improper to arbitrate the arbitrable issues prior to litigation. In *A. & E. Plastik Pak*, *supra*, the Court of Appeals for the 9th

Circuit specifically held that the District Court did not abuse its discretion in directing arbitration prior to litigation of anti-trust issues.

Faced with Armor's inconsistent assertions that, on the one hand, it needed declaratory relief declaring that alleged deficiencies in the material supplied by MVIW precluded Armor from manufacturing the licensed products (A126), and on the other hand, that it must defend the Westinghouse infringement "claim" and be free to grant a sublicense (A96), the District Court properly maintained the status quo by the grant of injunctive relief. The Court properly characterized the dispute as involving Armor's assertions as to

"Whether MVIW has furnished Armor the technical information required by Article III of the Agreement; whether the asserted failure of MVIW to furnish required information relieves Armor of its obligations under the Agreement; and whether a letter dated April 29, 1975 from \* \* \* Westinghouse \* \* \* constitutes a 'claim' within the meaning of Article VIII of the Agreement which would suspend Armor's obligation to pay royalties and afford Armor a choice of various courses of action, including defense of the 'claim' if MVIW elects not to take over the defense." (A168).

The District Court cannot be said to have abused its discretion when it concluded that litigation of purported counterclaims contained in a document belatedly served only two business days earlier should be stayed, and that arbitration compelled two months earlier wherein Armor had already appointed its arbitrator, should proceed. On reargument (after affording Armor the opportunity fully to brief its argument), the District Court adhered to the position that arbitration should first proceed and that all other matters before it would be stayed. It observed that no anti-trust issues had improperly been referred to



arbitration and that the License Agreement itself contained a severability clause. Provision was made for either party to move to vacate the stay which had been granted after completion of the arbitration proceedings (A215) without prejudice to the assertion by MVIW of all defenses and objections raised by it in the motion before the Court together with all such additional defenses and objections as might ultimately be addressed to the purported counterclaims\* (A215). That the Court acted properly is clear.

The severability clause to which the Court referred, provided that:

“Should any provision of this Agreement be determined to be invalid or unenforceable it shall not affect any or all of the other terms and provisions of the Agreement which shall continue in force and effect.”  
(A61)

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\* Including MVIW's claim that the newly served document was a supplemental and not an amended pleading, that it was not amendable as of right and not interposable at all in a proceeding under § 4 of the Arbitration Act, and that even as an amended pleading it was in many respects deficient and improperly sought to incorporate by reference matters contained in the original answer which had already been ruled upon. The allegations of the amended answer were made “upon information and belief” (A180), sought to incorporate by reference in the anti-trust allegations “all of the material allegations contained in the original answer as they may pertain to this counterclaim” (A181) and demanded, in part, a declaration as to the invalidity of Canadian patents on the theory that the Canadian Patent Office acted without due investigation but forgetting that the patent owner was not a party to the proceeding to compel arbitration and that the District Court would in no event have jurisdiction to adjudicate the validity of a foreign patent. *Aktiebolaget Stille-Werner v. Stille-Scanlan, Inc.*, 1 F.R.D. 395 (SDNY 1940) (improper incorporation by reference); *Sperry Products Inc. v. Aluminum Company of America*, 171 F.Supp. 961 (D. Ohio 1959) aff'd. on other grounds 285 F.2d 911 (6th Cir. 1960); cf. *Vanity Fair Mills, Inc. v. The T. Eaton Co., Ltd.*, 234 F.2d 633 (2d Cir. 1956).

Thus, even if anti-trust issues had been inadvertently introduced into the Agreement (and any such contention would be immediately contested by MVIW) the parties had themselves recognized that the offending paragraphs would not void or invalidate the Agreement (including the payment provisions). That factor alone distinguishes each of the cases cited by Armor, apart from *American Safety Equipment Corp.*, *supra*, and *A. & E. Plastik Pak*, *supra*, which are adverse to Armor's position in any event. Indeed, this Court in *American Safety Equipment Corp.*, *supra*, took note of the licensor's argument that even in the absence of such a clause the provisions violative of the anti-trust laws were severable. See also, *Sealy Mattress Co. of Southern California v. Sealy, Inc.*, 346 F. Supp. 353 (N.D. Ill. 1972), where a severability clause was contained in the agreement; *Henry J. Modry v. American Gage and Machine Co.*, 339 F. Supp. 1213 (SDNY 1972), *aff'd*, 478 F.2d 470 (2d Cir. 1973); *Kelly v. Kosuga*, 358 U.S. 516 (1959).

Claims of "illegal territorial resale restrictions" (App. Br. p. 24) by this non-manufacturing, non-royalty-paying licensee whose license is co-extensive with the territory but whose basic position is that the "market has passed it by" (and would therefore not commence production of the licensed products even in the absence of "restrictions") must be taken in the context in which they are advanced, to wit: avoid arbitration by any and all means.

If its claim were valid—and it is not—the offending provision would be severed and the Agreement would otherwise "continue in force and effect" (A61).

The Agreement would not be "vitiat[e] \* \* \* for illegality" (App. Br. p. 25), as Armor suggests, nor would it have any effect on MVIW's claim or Armor's counterclaim, presently before the arbitrators.

Under the License Agreement, Armor's "sole remedy" (A60) in the event of a "substantia" breach by MVIW

of the warranties upon which Armor relies (*supra*, p. 5), is the termination of the Agreement "without further liability or damage of any kind of either party to the other" (A60) (subject to the reimbursement of Armor for costs and expenses, if any, in defending any claim of infringement but not to exceed 100,000 Australian dollars [A43]).

The fact of the matter, however, is that Armor is looking for anti-trust problems where none exist. Thus it makes repeated references to the provisions of the License Agreement applicable to Armor's "sales affiliate" (App. Br. p. 24) to lend support to the claim of an allegedly improper territorial restriction, but in so doing, Armor forgets not only the severability clause but forgets just who its "sales affiliate" actually is.

The first reference to "sales affiliate" in this proceeding is found in Armor's original answer to the petition to compel arbitration (A122) where Armor referred to itself and to its "sales affiliate" (A123) as being

"firmly established in the business of manufacturing and selling elevators and elevator components in the United States and Canada."

James N. Johnson, Smith's counsel, identified Armor Canada Ltd. as the sister subsidiary to the Licensee in the A. O. Smith Corporation family (A139) and went even further by stating that:

"Armor New York [sic] and Armor Canada lost the opportunity to establish primacy in the elevator market and the purpose for which Armor New York [sic] and Canada had entered into the Licensing Agreement had been frustrated." (A139)

The irony of bottoming its anti-trust assertions on the Agreement's reference to "sales affiliate"—treating Armor Canada as a stranger to Smith's corporate family—is



probably best reflected by the fact that Armor used its "sales affiliate" and the latter's unrelated patent problems with Westinghouse as an excuse for suspension of royalties under the Agreement with MVIW (A94, A139-A141).

The District Court did not close its eyes to the matters brought to its attention by Armor and Smith. It concluded, in the exercise of its sound discretion, that the previously directed arbitration should proceed without prejudice and with leave to MVIW to raise, at later date, all of the defenses and objections that might be properly addressed to a purported amended pleading which, on its face and apart from its lateness, is a model of non-conformity with Rules 8 and 9 Fed. R. Civ. P.

### Conclusion

No party to an agreement containing a provision for arbitration is relieved from the arbitration of disputes by the mere shout of "anti-trust". No respondent in a proceeding to compel arbitration may sit back, suffer an adverse decision, appoint its arbitrator, and, at the eleventh hour, attempt to raise new matters for the sole purpose of aborting the vehicle which the parties have chosen for the prompt resolution of their disputes.

The arbitration panel is complete and hearings may promptly be had.

Despite its inexcusable failure to assert its alleged claims in a counter-demand for arbitration (which under the principle enunciated in *Necchi Sewing Machines Sales Corp. v. Necchi S.p.A.*, 369 F.2d 579 (2d Cir. 1966), might have precluded it from doing so), Armor has suffered no prejudice, as the rules of the American Arbitration Association permit the interposition, and Armor has interposed, its counterclaim in the pending proceeding. The issues so framed for the arbitrators are clear-cut and free of complexities.



The Supreme Court, in *Scherk v. Alberto Culver Co.*, 417 U.S. 506 (1974), observed that

“An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum—selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement \* \* \* would not only allow the respondent to repudiate his solemn promise but would, as well, reflect a ‘parochial’ concept that all disputes must be resolved under our laws and in our courts \* \* \*.”

The solemn promise made by Armor may not now be repudiated. The order compelling arbitration was appropriate when entered and is appropriate now. The order entered three months later which stayed further proceedings until the conclusion of that arbitration is not appealable and, in any event, constitutes an appropriate exercise by the District Court of its discretion in the context of the circumstances reflected in this record.

Respectfully submitted,

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(59096)

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

N.V. MAATSCHAPPIJ VOOR INDUSTRIELE WAARDEN,

Petitioner-Appellee,

against

A. O. SMITH CORPORATION,

Respondent,

and

ARMOR ELEVATOR COMPANY, INC.,

Respondent-Appellant.

**AFFIDAVIT  
OF SERVICE**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK,  
COUNTY OF NEW YORK, ss.:

Nathan Chambers, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 510 Atlantic Avenue, Brooklyn, New York. That on December 15, 1975, he served 2 copies of Brief for Petitioner-Appellee N. V. Maatschappij Voor Industriële Waarden on

SACKS, MONTGOMERY, MOLINEAUX  
& PASTORE, Esqs.,  
437 Madison Avenue,  
New York, New York 10022

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

*..Nathan Chambers..*

Sworn to before me this  
15th day of December, 19 75

*John V. Desposito*  
JOHN V. DESPOSITO  
Notary Public, State of New York  
No. 30-0932360  
Qualified in Nassau County  
Commission Expires March 28, 1977